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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-587

S. WALLACH COMPANY, INC.,

Petitioner,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT (Docket No. 1747 E/72)

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Petitioner S. Wallach Company, Inc., prays that a writ of Certiorari issue to review the Order of the New York State Supreme Court, Appellate Division, Second Department entered in the above entitled case, Docket No. 1747 E/72, on February 5, 1973. The New York Court of Appeals denied Plaintiff's timely motion for leave to Appeal on July 2, 1973.

The Order of the New York Supreme Court, Appellate Division, Second Department, was made an entered on February 5, 1973. The Appellate Division denied a Motion for Reargument on April 4, 1973. The New York Court of Appeals denied Plaintiff's Motion for Leave to Appeal on July 2, 1973. No Petition for Rehearing of the Order of the New York Court of Appeals was filed. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

(This is a companion case to Rolf Topik, et al v. Catalyst Research Corporation, et al, U.S. Supreme Court Docket No. 73-127. Citations in this Petition to an Appendix will be to the Appendix in this Court of the Topik case.)

Opinion Below

The New York Supreme Court, Westchester County (per Joseph F. Hawkins, J.S.C.) granted "Accelerated Judgment," dated February 18, 1972 in an unreported memorandum, which is printed at App. D4. The New York Supreme Court, Appellate Division, Second Department, affirmed the lower court on February 5, 1973 in an order without opinion, reported at – –App.Div.2d – –, which is printed at App. D1. The Appellate Division also denied a Motion for Reargument in an Order without opinion dated April 4, 1973, which is printed at App. D3. The New York Court of Appeals denied Plaintiff's Motion for Leave to Appeal in an unreported Order dated July 2, 1973, which is printed at App. D1).

Jurisdiction

The Order of the New York Court of Appeals as aforesaid was made and entered on July 2, 1973. No Petition for Rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

Questions Presented

Page 4 of the Petition of Rolf Topik, Doc. 73-127, is incorporated herein by reference.

Constitutional Provision and Statute Involved

The Constitutional provision and statutes involved are the Fourteenth Amendment to the United States Constitution and Article 32 and Sections 3211 and 3212 of the New York Civil Practice Law and Rules, printed in Appendix A.

Statement

Pages 11-14 of the Petition of Rolf Topik, Doc. No. 73-127, are incorporated herein by reference.

Reasons for Granting the Writ

Pages 14-29 of the Petition of Rolf Topik, Doc. No. 73-127, are incorporated herein by reference.

CONCLUSION

For The Foregoing Reasons, The Petition For Certiorari Should Be Granted.

Respectfully submitted,

JAMES V. JOY, JR.
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New York, N.Y. 10017

NEW YORK COURT OF APPEALS

S. WALLACH COMPANY, INC.,
Appellant,

vs.

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Respondent.

Mo. No. 286

DECISION OF COURT OF APPEALS Jul 2 1973

Motion for leave to appeal denied with ten dollars costs and necessary reproduction disbursements.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Secpnd Judicial Department, held in Kings County on February 5, 1973

HON. J. IRWIN SHAPIRO, Acting Presiding Justice
HON. FRANK A. GULOTTA)
HON. MARCUS G. CHRIST) Associate Justices
HON. ARTHUR D. BRENNAN)
HON. A. DAVID BENJAMIN)

S. Wallach Company, Inc.,
Appellant,

v.

International Business Machines Corporation,
Respondent.

Order on Appeal from Order Civil Action or Proceeding

In the above entitled cause, the above named S. Wallach Company, Inc., having appealed to this court from an order of the Supreme Court Westchester County, dated March 6, 1972; the said appeal having been argued by James V. Joy, Jr., Esq., of counsel for the appellant and by Lawrence T. D'Aloise, Jr., Esq., of counsel for the respondent, due deliberation having been had on said appeal, and upon the court's decision slip heretofore filed and made a part hereof, it is

ORDERED that the order appealed from is hereby affirmed, with $10 costs and disbursements.

Enter:

Irving N. Selkin

Clerk of the Appellate Division

___A D 2d ___ A- January 15, 1973

1747 E/72 S. Wallach Company, Inc., appellant, v. International Business Machines Corporation, respondent

Order of the Supreme Court, Westchester County, dated March 6, 1972, affirmed, with $10 costs and disbursements. No opinion.

SHAPIRO, Acting P.J., GULOTTA, CHRIST, BRENNAN and BENJAMIN, JJ., concur.

February 5, 1973 S. WALLACH CO., INC. v INTERNAT'L BUSINESS MACHINES 1747 E/72

Lower Court Opinion

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CAPTION

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HAWKINS, J.

The defendant moves for "accelerated judgment," pursuant to "Article 32 of the C.P.L.R."

In this complaint alleging slander, the plaintiff, "a corporation organized under the laws of the State of New Jersey" [sic] states that it is engaged in "developing and selling computerized data particularly to the construction industry in the form of critical path scheduling." The substance of the alleged slander is that the defendant informed an officer of another corporation that it, meaning thereby the plaintiff, stated of the plaintiff that its "critical path scheduling is unsatisfactory to the defendant IBM." The complaint then pleads by innuendo that the alleged defamatory utterances was engendered by malice and was "particularly designed to do severe economic harm to the plaintiff in his [sic] profession."

The defendant urges, firstly, that the complaint fails to state a cause of action; secondly, that there is a meritorious, affirmative defense of qualified privilege; and, lastly, justification.

The complaint does not, in my opinion, state a cause of action. For an action in slander to be maintainable, it must be slanderous, per se. If innuendo must be pleaded so as to render actionable the non-salnderous per se utterance, special damages must be pleaded and proved. (See, Seelman, *The Law of Libel and Slander* [Revised Ed., Vol. 2, Ch. XIII; also, Ch. XX, Vol. I])

Apart from the foregoing general insufficiency, upon the submission, the defense of qualified privilege, assuming the matter com-

complained to be otherwise actionable, is a complete defense. At bar, there existed such, "corresponding interest or duty" as to render the situation privileged. (*Shapiro v. Health Ins. Plan*, 7 N.Y. 2d 56.) The rationale for the genesis and persistence of this complete defense in the law of defamation is there fully considered. (see, also, *Seelman, supra*, Vol. 2, Ch. XI.)

Respecting the third defense urged by the defendant, that of justification, in view of our above consideration of the two prior affirmative defenses, I do not deem it necessary to consider same.

We note, but do not comment upon the second paragraph of the complaint, which merely alleges plaintiff's corporate status as one organized under the Laws of the State of New Jersey, but does not contain the requisite further allegations mandated by Sec.1312 of the Business Corporation Law, to wit, that it has "been authorized to do business in this state and it has paid to the state all fees,penalties and franchise taxes for the years or parts thereof during which it did business in this state without authority. This prohibition shall apply to any successor in interest of such foreign corporation."

The defendant's motion is granted.

Submit order on notice.

Joseph F. Hawkins

J.S.C.

Dated: February 18, 1972

Appearances:

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Respondent.

(Docket No. Mo. No. 286, July 2, 1973)

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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(Docket No. Mo. No. 286, July 2, 1973)

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

Preliminary Statement

Petitioner has joined the petition for certiorari in this case from the New York State Court of Appeals with similar petitions in a case from the Fourth Circuit (*Topik* v. *Catalyst Research Corp.*, No. 73-127) and a case from the Seventh Circuit (*Hayne* v. *Boeing Company*, 73-250). The petition in the *Topik* case sets forth petitioner's arguments for certiorari in all three of these actions. It is petitioner's position that the three cases viewed collectively present important questions pertaining to abuse of the

summary or accelerated judgment procedures by our Courts. These three cases have nothing in common except for the fact that the petitioners in each case were represented by the same attorney.

Statement of Facts

The facts in *Wallach* are simple. Petitioner was in the business of preparing critical path method scheduling which is a method of planning and scheduling building construction activities on a given project before actual work is begun. In March of 1970 respondent IBM awarded a contract for the construction of an office building in Sterling Forest, New York, to the William L. Crow Construction Company. IBM requires that Critical Path Schedules be used on all its construction projects. Prior to March 1970 the Wallach company had been used by various contractors on several other IBM construction projects. IBM had found that petitioner's work had been unsatisfactory on these projects. When IBM was told by the Crow company that it was considering the Wallach company on the Sterling Forest project, IBM advised that Wallach's submissions were unsatisfactory to it.

Thereafter, the Wallach Company instituted a lawsuit alleging that IBM's statement to the Crow Company that Wallach's services were unsatisfactory was defamatory (Petitioner's appendix, page D-6). A motion was made on behalf of IBM for accelerated judgment in accordance with Article 32 of the Civil Practice Law & Rules of the State of New York. Essentially IBM sought dismissal of the complaint or summary judgment. The motion was granted (Appendix C-4) and the decision of the lower Court was affirmed by the Appellate Division of the State of New York, Second Judicial Department. Petitioner's motions for reargument before the Appellate Division and for leave to appeal to the Court of Appeals were denied.

Petitioner claims before this Court that the granting of summary judgment was unconstitutional under the Fifth and Fourteenth Amendments.

POINT I

The petition herein should be denied.

The three petitions before this Court are completely unrelated, *Wallach* involves an alleged slander of plaintiff's work product. *Topik* involves the unfair allocation of the proceeds of a merger and damages for the restriction of the growth of a corporation by tort and breaches of contract. *Hayne* involved an anti-trust action where damages were sought for invasion of privacy and claims of blacklisting.

The only similarity between these cases is that each plaintiff's claim was dismissed summarily by a Judge. In *Wallach* accelerated judgment was granted against the plaintiff. In *Topik,* summary judgment was granted against the plaintiffs. In *Hayne,* the complaint was dismissed at the end of the plaintiff's case.

Except for the anti-trust claim in *Hayne,* none of these cases involve any Federal questions. The decisions are not adverse to any decisions of this Court nor in conflict with the decisions of other Courts on the same matters. There is no departure from the accepted or usual course of judicial proceedings involved in these cases.

Petitioner concedes that the *Wallach* petition standing by itself "would stand a good chance of being denied [certiorari] as involving matters not sufficiently consequential" (Petitioner's Brief page 16). Petitioner's sole claim is that the Federal and State summary and accelerated judgment procedures are being applied unfairly against plaintiffs in complex cases, thus denying the right to trial by jury and due process of law as guaranteed under the Fifth and Fourteenth Amendments.

Summary judgment properly granted does not unlawfully deprive the losing party of the guaranteed right of jury trial nor does it unlawfully deprive him of property or the right to an orderly trial (*Diamond* v. *Davis*, 38 N.Y.S.2d 103, aff'd 265 A. D. 919, aff'd 292 N. Y. 552). One of the purposes of summary judgment is to expedite disposition of civil cases where no issue of material fact is presented to justify trial (*Appel* v. *Root*, 236 N.Y.S.2d 376, aff'd 18 A.D.2d 686, aff'd 13 N.Y.2d 748).

In *Wallach*, the lower Court found that the complaint did not state a cause of action and that the statement made by IBM to its contractor was privileged because of the common business interests in the topic. The intermediate Court affirmed specifically finding that Wallach's papers in opposition raised no issue of fact with respect to malice. The petitioner does not seem to claim that this determination on the merits violates any important question which would merit review by this Court. Rather, it appears to be petitioner's contention that because his attorney did not receive IBM's memorandum of law until the return date of the motion and for certain other technical reasons, its constitutional privileges were denied.

Petitioner had adequate notice of the relief sought by IBM. The notice of motion stated that IBM was seeking accelerated judgment under Article 32 of the Civil Practice Law & Rules. IBM sought to dismiss the complaint for its failure to state a cause of action and for summary judgment. Since the only two sections of Article 32 which could possibly be relevant to an accelerated judgment motion were 3211 and 3212, appellant certainly had notice of what relief was being requested.

Petitioner's argument that it was somehow prejudiced by the receipt of IBM's memorandum of law on the return date of the motion is unfounded. As above stated, the Notice of Motion adequately informed petitioner of what relief was being requested. The law is of course equally

available to both sides. There is no requirement that a memorandum of law be submitted before oral argument. In any event, petitioner was allowed more than ample opportunity to reply. In fact, petitioner fails to point out that it submitted *three* reply memoranda of law and a letter to the Court after the return date of the motion.

Petitioner's argument that the absence of the complaint from the Court file somehow vitiates the Court's decision is of no merit. The opinion of the lower Court Judge in deciding the motion refers to the complaint in several instances. Petitioner admits that this Judge must have had the complaint before him at the time of its decision. The Appellate Court had the complaint before it in the record on appeal. The fact that the copy of the complaint relied on by the Court somehow did not find its way into the Court's files is completely irrelevant.

The petitioner had its day in Court. The Court found the complaint did not state a cause of action and further that petitioner failed to raise an issue of fact with respect to malice. Accordingly, as a matter of law the complaint was dismissed. The fact that summary judgment was granted against petitioner in this action does not justify the conclusion that the rules for summary disposal of actions were unfairly applied against petitioner. Clearly, petitioner herein was treated most fairly in that it was allowed more than ample opportunity to reply to IBM's motion.

Furthermore, petitioner's argument that the rules for summary judgment were unconstitutionally applied in that case was raised before the New York State Court of Appeals which impliedly rejected such claims when it denied petitioner's motion for leave to appeal.

The petition for certiorari presents no question worthy of review by this Court. Consequently, the petition should be denied.

Respectfully submitted,

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